IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	:	
	:	**Criminal No. 04-489**
v.	:	
	:	
NORVEL VAS	:	

MEMORANDUM OPINION AND ORDER

RUFE, J. **May 30, 2006**

On October 27, 2005, after a two day trial, Norvel Vas ("Defendant") was convicted of violating 18 U.S.C. § 922(g)(1), which prohibits felons from possessing firearms. On November 7, 2005, Defendant, through counsel, timely filed, among several *pro se* post-conviction motions,[1] a Motion for New Trial pursuant to Federal Rule of Criminal Procedure 33.[2] Before the Court is Defendant's Motion for New Trial wherein he argues that the Court should grant him a new trial because he was not permitted to represent himself at trial.

I. Factual and Procedural Background

On September 21, 2004, Magistrate Judge Charles B. Smith appointed the Defender Association of Philadelphia, Federal Courts Division, to represent Defendant at trial.[3] The original trial date was set for November 26, 2004. On September 23, 2004, Benjamin B. Cooper of the

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[1] On November 1, 2005, Defendant, *pro se*, filed a Motion for Extension of Time, a Motion for Trial Transcripts, Docket Sheets, and Transcripts from All Relevant Hearings, a Motion for Bill of Particulars/Information. Documents #83, #84, #85, and #86, respectively. On November 3, 2005, the Court dismissed Defendant's motions as moot, as all of the requested information was contained in the trial record and available to Defendant. Document # 87.

[2] Doc. #88.

[3] At Defendant's initial appearance in federal court, he was represented by Rossman Thompson, Esquire, an assistant federal public defender.

Defender Association of Philadelphia entered his appearance as counsel for the Defendant in this case. However, on September 27, 2004, Mr. Cooper filed a Motion to Withdraw as Attorney due to a conflict of interest. After a hearing, the Court granted the motion to withdraw.

On October 13, 2004, the Court appointed as substitute counsel Jeanne Damirgian, Esquire, from the Criminal Justice Act ("CJA") Panel for the Eastern District of Pennsylvania.[4] On October 29, 2004, the Court granted Defendant's unopposed Motion to Continue Trial Date and Extend Time Within Which to File Pretrial Motions.[5] On March 16, 2005, the Court granted Defendant's Application for Additional Funds for Investigative Services to allow Defendant to hire a private investigator.[6]

While preparing for trial, Defendant and Ms. Damirgian reached an impasse concerning trial strategy, preparation, and how best to utilize the services of the private investigator. Their attorney-client relationship deteriorated to the point where the two were unable to communicate to develop a cogent defense to the charge lodged against Defendant. As such, Ms. Damirgian filed a Motion to Withdraw as Counsel on May 27, 2005,[7] which the Court granted after conducting a hearing on the motion and learning of Defendant's acquiescence in counsel's decision to withdraw .[8] The Court thereafter promptly appointed Patrick Egan, Esquire, also a member of the

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[4] Document #20.

[5] In the following months, the Court granted two trial date continuances requested by Defendant and one such request by the government.

[6] Doc. #40.

[7] Doc. #42.

[8] Doc. #45.

CJA panel, as substitute counsel.[9] Defendant, through counsel, filed on June 14, 2005 a second Motion to Continue the Trial Date,[10] which the Court granted. The Court set the final trial date for October 25, 2005.

Between July 22, 2005 and October 17, 2005, Defendant filed five *pro se* motions and two letters with the Court despite being represented by counsel. On July 22, 2005, Defendant, *pro se*, filed a Motion for Discovery.[11] On August 8, 2005, Defendant, *pro se*, filed a letter addendum[12] to supplement his attorney's Motion to Suppress Physical Evidence.[13] On September 19, 2005, Defendant, *pro se*, filed a Notice of Particulars Concerning the 911 Call of Citizen Jean Hastings.[14] On September 26, 2005, Defendant, *pro se*, filed a Motion for Change of Appointed Counsel.[15] On October 5, 2005, the Court heard Defendant's Motion for Change of Appointed Counsel, and denied the motion as groundless. [16] On October 12, 2005, Defendant, *pro se*, filed a Request for Witnesses and To Change Appointed Counsel.[17] The next day, on October 13, 2005,

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[9] Doc. #46.

[10] Doc. #48.

[11] Doc. #50.

[12] Doc. #53.

[13] Doc. #51.

[14] Doc. #59.

[15]Doc. #61.

[16] At the hearing, Defendant complained that Mr. Egan failed to call all three arresting officers to testify at his suppression hearing. The Court notes that Mr. Egan called two of the three arresting officers, but made a strategic decision not to call the third officer. Based on the arguments and information provided at the October 5th hearing, the Court found Mr. Egan to be competent and capable of representing Defendant in his criminal trial.

[17] Doc. #64.

Defendant, *pro se*, filed a letter with the Court wherein he stated that "Mr. Patrick Egan has advised me to represent myself."[18] Finally, on October 17, 2005, Defendant, *pro se*, filed a Motion as to Use of Extrinsic Evidence/Witness Impeachment, Defense Witness List/Discovery Issues wherein he "plead[ed] . . . the Court to change his appointed counsel."[19]

Defendant's trial commenced on October 25, 2005. At the outset, Mr. Egan alerted the Court to Defendant's insistence on wearing his prison-issued clothing during trial despite Mr. Egan's advice to the contrary. The Court explained to Defendant that it would accommodate his decision to wear the suit if he chose to do so, however, Defendant declined the offer to change into the clothing brought to the courtroom by his wife. While Defendant's competency to stand trial was not implicated by his pre-trial and trial behavior, the Court conducted the following colloquy to ensure that Defendant's decision to wear prison garb was made knowingly and voluntarily:

The Court:	Have you discussed this decision with Mr. Egan?
Defendant:	I just exactly what I —
The Court:	You need to answer my question.
Defendant:	Yes, ma'am.
The Court:	Have you discussed it with him?
Defendant:	Well, I told him I'm comfortable with what I have on, yes, ma'am. I told [him] I'm comfortable with what I have on, Your Honor.
The Court:	And are you satisfied with his advice on this issue?

[18] Document #66.

[19] Document #69.

Defendant: Well, I'm satisfied with what I have on, Your Honor, and I told him that. And I know that – I just wanted —

The Court: All right. I – I need to know if this is against Mr. Egan's advice. I think I need to know that on the record.

Defendant: I mean, you could ask him —

Mr. Egan: Yes, Your Honor, it is.[20]

After this colloquy, the Court addressed Defendant's final two *pro se* filings, which he filed several days before the trial date. These filings pertained to, among other things, discovery of police documents that Defendant sought to use in his defense. During this discussion, Defendant became increasingly agitated, combative, and disruptive. Specifically, the Court had to instruct Defendant several times to address the Court through his attorney, and twice had to order him to remain seated.[21] Immediately after the Court proposed its solution to the discovery dispute,[22] Defendant, through counsel, requested for the first time[23] to proceed *pro se* and maintain his court-appointed lawyer as backup counsel.[24] The Court denied Defendant's request without immediate further inquiry, since the request appeared to be nothing more than a whimsical reaction to the

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[20] 10/25/2005 N.T. at 6 - 7.

[21] 10/25/2005 N.T. at 19 - 20.

[22] Specifically, the Court proposed: "I'm wondering how we can start this trial, pick the jury, do what we can, and then, leave some time tomorrow, maybe late in the afternoon, to address [the discovery issue], when maybe Mr. Egan can go with [the prosecutor, Mr. Labar] and look at [the archived] records." 10/25/2005 N.T. at 21. This resolution was designed to meet the twin aims of securing for Defendant certain police documents believed to be archived by the City of Philadelphia and allowing the trial to progress without undue delay.

[23] The Court notes that none of Defendant's pretrial *pro se* motions contained a request for Defendant to represent himself. Rather, Defendant repetitiously filed motions requesting the Court to appoint him new counsel. See Documents #61, #64, and #66.

[24] Id. Specifically, Mr. Egan stated: "Your Honor, Mr. Vas has indicated to me at this point that he wishes to proceed *pro se* and have me as backup counsel." Id.

Court's refusal to allow either the discovery dispute or Defendant's choice of clothing to hinder the commencement of the trial.

Thereafter, the Court proceeded to generate a list of potential jurors in order to conduct voir dire. Once the list of potential jurors was generated, the Court announced that it would take a ten-minute recess before the voir dire process began. Just prior to the recess, however, Mr. Egan informed the Court that Defendant had instructed him again to request that the Court to allow him to represent himself. Upon this request, the Court heard Defendant's argument for self-representation, but ultimately denied his request.[25]

After ruling on Defendant's request, the Court conducted voir dire, selected a jury, swore the jury in, gave preliminary instructions, and dismissed court for the day. The next morning, the government presented its case in chief, and the Court recessed for the luncheon hour after the government rested. When the parties reconvened in the court room, Mr. Egan informed the Court that during the lunch recess Defendant had instructed him, against Mr. Egan's advice, to call as a defense witness one of Defendant's arresting officers. At Mr. Egan's request, the Court engaged Defendant in the following inquiry to ascertain, on the record, an accurate account of the exchange between Defendant and his attorney, as several times pre-trial and during trial Defendant openly

[25] During the course of its exchange with Defendant on his motion to proceed *pro se*, the Court stated: "Mr. Vas, this may be what you call a right, but it is not a constitutional right." Transcript of Record Vol. I at 33. The complete record reveals that this statement was an error in locution rather than law. In this instance, the Court intended to express to Defendant only that his right to self-representation was not an "absolute" right—one that could be wielded by Defendant at any juncture in the trial to delay, alter, or otherwise manipulate its orderly progression. The record further bears out this distinction in that the Court, when it subsequently engaged Defendant to determine whether he asserted his right to self-representation seriously, or whether–as the Court initially concluded–he played at asserting a right he did not actually intend to assert, acknowledged that it was within Defendant's constitutional rights to represent himself but admonished him that the right was not without limitation.

misstated and/or misrepresented conversations between Defendant and his lawyer:[26]

> The Court: All right, Mr. Vas. Do you agree that Mr. Egan must call [the arresting officer]? Is this your desire?
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> Defendant: My desire is that I represent myself, Your Honor, which we all know, and you didn't allow that. . . .
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> The Court: When was it that you first decided that you wished to represent yourself?
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> Defendant: It was a while, what I was tellin' [sic] Patrick Egan all the time, and he said he was gonna [sic] tell you. And I even wrote you a letter and told you that.
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> The Court: When was it that you first decided to tell the Court that you wished to represent yourself[?]
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> Defendant: I told my lawyer. You was tellin' [sic] me all the time to talk to my lawyer, to go to my lawyer. You say I'm irrational in court. You threatened me with the marshals. I told my lawyer for a long time I wished to represent myself, and I told you in a letter and you advised me to represent myself.[27] You didn't address the letter the last time I got here.
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> The Court: I don't think that's – that's accurate because any letter you sent me—
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> Defendant: Well, I got a copy of the letter right here.
>
> Mr. Egan: Actually, Your Honor, —

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[26] For example, contrary to Mr. Egan's account, Defendant had insisted at various points before trial and at trial that his lawyer told him: (1) that he would call all three of Defendant's arresting officers to testify at Defendant's suppression hearing; (2) that he should represent himself at trial; and (3) that he should take the stand in his own defense.

[27] There was no instance where this Court advised or even intimated that Defendant should represent himself. As stated previously, Defendant's contention that he submitted correspondence to the Court expressing his desire to represent himself is also untrue. Rather, Defendant's pretrial filings simply requested appointment of substitute counsel. Also noted previously, the first mention of Defendant's desire to proceed *pro se* was made orally in open court on the morning his trial was to begin.

Defendant: I got a copy of the letter right here and you was gonna [sic] excuse me. . . .

Mr. Egan: Your Honor, I actually was going to, now that Mr. Vas says that, I think in the most recent letter that he sent the Court, in one – at one point maybe the second or third – it was a very lengthy letter – at some point in the letter he said something to the effect that I had – I think he said, advised him he should represent himself. It's actually not an accurate statement.

Defendant: I beg to differ. . . .

Mr. Egan: In the course of a conversation that took place at the [federal detention center], wherein another one of our strategy disagreements was taking place, I did advise him of his right to do that, that he could, at some point, ask to do that. I never told him he should.

The Court: And it's not my understanding that he made, or exercised that option at any point other than when we were beginning to start the trial on the morning of.

Mr. Egan: That's correct.

The Court: I don't believe that in the prior hearings where Mr. Vas was in court, that he ever said to the Court that he wished to proceed *pro se*. Mr. Vas, did you or did you not ever ask the Court to proceed *pro se* before we were about to pick a jury?

Defendant: Judge, . . . [y]ou told me when I was filin' [sic] the motions the last time, I'm goin' [sic] to direct my counsel and I told him I wanted to represent myself, and he said that I could and that he would get to the Judge about it or make sure that I could, you know. You didn't allow me to do it. You said it wasn't my right, and you know the law better than me. If it's not my right, it's not my right.

The Court: Well, you may have the right under certain circumstances, but it can't be exercised on a whim. It can't be exercised –

Defendant: It wasn't exercised on a whim, Your Honor.

The Court: No, you have to– you have to wait until I finish speaking.

Defendant: Yes, ma'am. I'm sorry.

The Court: Which is one of the problems that I've had with your conduct.

Defendant: I'm sorry.

The Court: And you continue to do it. You did it in pre-trial hearings. You did it before we started this trial. How can I ever expect that you would be representing yourself in a competent manner. So, number one, you have to tell the Court. Two, I have to go through a series of questions with you to see if you are capable of doing it and if you know what you are doing. And three, it can't be done on a whim in order to delay the trial, which it would have been, or to get to testify in front of the jury, when you, yourself, are not testifying.

Defendant: I understan' [sic], and it wasn't done on a whim and it wasn't gonna [sic] be postponed and it wasn't goin' [sic] to be delayed. I let you know I was ready right then and there. I told you I was studyin' [sic] it. I was studyin' my case all the time. I got my paperwork. He's got it. He's supposed to be usin' [sic] it, you know. I told you before that Mr. Egan wasn't studyin' [sic] my case properly. I mean, you know, here we are, you know, and we goin' [sic] to trial now and I'm hearin' [sic] these things about how what kind of feelins' [sic] you're gonna [sic] have about it. I'm sabotaged at the best —

The Court: Well, I'm going to ask you to be sworn in because I want to ask you a series of questions right now.

Defendant: I was sworn in.

The Court: Now you may stand to be sworn in.

Deputy: Raise your right hand. You do swear or you do so

affirm that the testimony you shall give to the court shall be the truth, the whole truth, and nothing but the truth, so help you God, or you do so affirm.

Defendant: Yes. . . .

The Court: Mr. Vas, have you ever studied law?

Defendant: To a degree, yes. . . .

The Court: Where have you studied law?

Defendant: In prison.

The Court: Has anyone taught you law in prison?

Defendant: We had paralegals that was teachin' [sic] me different things and used to come into the prison.

The Court: Have you ever represented yourself in a criminal proceeding before?

Defendant: No, ma'am.

The Court: You understand what you're charged with here, right?

Defendant: Yes, I do.

The Court: You understand the charge is a felon being in possession of a firearm, a felon being someone who was convicted of a felony for a term of – convicted of a crime for which the punishment exceeded one year. Internment in prison exceeded one year. Do you understand that?

Defendant: Yes, ma'am.

The Court: And you understand that the charges that that particular type of felon knowingly possessed in or affecting interstate or foreign commerce, in this case, two firearms, two pistols, and they were loaded with live rounds. Do you understand those are the charges? Right?

Defendant: Yes, Your Honor.

The Court: Do you understand what the penalties are if you are convicted of this count?

Defendant: Yes, ma'am.

The Court: What are they?

Defendant: Prison sentence. Supervised release.

The Court: How much prison time?

Defendant: Probably 120 month [sic]. Three years supervised release.

The Court: Is that correct, Mr. Labar?

Mr. Labar: Yes, Your Honor.

The Court: And that's a mandatory minimum sentence?

Mr. Labar: It's [not] a mandatory, Judge. [That]'s the statutory max.[28]

The Court: Is there any mandatory minimum involved in this case?

Mr. Labar: There is not.

The Court: So, it's up to ten years . . . in jail, a hundred and (120) months, up to 3 years supervised release, and a fine. How much is the fine, Mr. Labar?

Mr. Labar: Two-hundred and fifty thousand dollars ($250,000).

The Court: Thank you. Do you understand that's what you're facing, among other conditions of sentence, if you are convicted?

Defendant: Yes, ma'am. . . .

[28] The trial transcript misrepresents the actual exchange between Mr. Labar and the Court. The language contained herein, however, accurately recounts the exchange. See 10/26/2005 N.T. at 132.

The Court: Were you being supervised on any type of sentence, that is, parole or supervised release or probation? . . . .

Defendant: No, I wasn't.

The Court: You were previously, however, convicted of a robbery. Is that correct?

Defendant: Yes, ma'am.

The Court: And what was your sentence on that robbery?

Defendant: Ten (10) years.

The Court: Ten (10) years?

Defendant: Yes.

The Court: In jail?

Defendant: Yes.

The Court: Was that a federal offense or a state offense[?]

Defendant: State offense.

The Court: And how much time did you do on that robbery?

Defendant: I wound up doing it all, if I'm not mistaken.

The Court: What's that?

Defendant: I wound up doing every day of it.

The Court: Did you max out?

Defendant: Yes, ma'am.

The Court: Why is that?

Defendant: Different parole violations and things of that nature.

The Court: After you maxed out on the robbery were you arrested

for anything else besides this offense?

Defendant: Yes.

The Court: What was that?

Defendant: Some misdemeanor charges.

The Court: Were you sentenced on any of those?

Defendant: Yes.

The Court: What was your sentence?

Defendant: County sentences. Six to twenty-three months.

The Court: Were you serving any of those paroles at the time you were arrested?

Defendant: No, ma'am, Your Honor.

The Court: What I'm trying to get to, is, if you were, and you were convicted on this offense, you could stand to serve back time, so there's a – there's a way that you might be exposed to serving more time on your county sentence as well. That's what I'm trying to get you to understand. Do you understand me?

Defendant: I understand what you're sayin' [sic], yes ma'am.

The Court: And it's not necessarily if you are – if you are facing any back time, or revocation of another sentence, there is no guarantee that those sentences would run concurrently with this one. They could run consecutively. Do you understand that[?]

Defendant: I surely will, yes ma'am.

The Court: And do you understand that on the sentence, while the maximum possible penalty is a hundred and twenty (120) months, the Court is empowered to grant any sentence up to that amount. Do you understand that?

Defendant: Yes, ma'am.

The Court: Do you understand that if you choose to represent yourself, you will be on your own and this Court cannot give you any advice as to how to try your case?

Defendant: Well, I don't see . . . how I can represent myself at this juncture because I feel to go to trial has been spoiled.

The Court: How is it spoiled?

Defendant: I feel the job was represented ineffectively . . . .
The Court: Are you familiar with the [F]ederal [R]ules of [E]vidence[?]

Defendant: Yes, ma'am, to a degree.

The Court: Were you ever charged with a crime in the federal system before this case?

Defendant: No, ma'am.

The Court: So, how can you be familiar with the [F]ederal [R]ules of [E]vidence?

Defendant: I think they have, uh, books that you can read. If I'm not mistaken I think I've read a few of the studies of cases and you know, tried like myself, as best as I could. I studied enough for the . . . [R]ules of [E]vidence concerning my particular situation. . . .

The Court: Are you familiar with the [F]ederal [R]ules of [C]riminal [P]rocedure[?]

Defendant: As they applies [sic] to my case.

The Court: So you don't have any familiarity with them other than this case? Is that what you're telling me?

Defendant: Well, I'm tellin' you I understand how they apply to my case. I don't know how they apply to the next man's case, what he's charged with, his particular charges. I know about my charges and my case and what happened

in my case.

The Court: Well, regardless of —

Defendant: Those allegations that relates [sic] to my case.

The Court: Regardless of what you say you've learned about the law and the procedure and the evidence, I don't think you're trained and I don't think you're experienced in defending your case better than the attorneys who were appointed to represent you.

Defendant: And why is that?

The Court: I think – I didn't ask you to speak.

Defendant: Oh, I'm sorry.

The Court: I think that it would be unwise for you to do so. I think it would be a very big mistake because you are not familiar with the law. You're certainly not familiar with the rules of criminal procedure as they relate to discovery which is evident in this record, which we have repeatedly gone over with you at previous hearings.

You're not familiar with the trial strategy that would demand that you put an officer on the stand against your attorney's advice, who previously testified in a pre-trial hearing and only hurt you, because I heard the evidence and I made those findings. So, I don't think that you are familiar, sir . . . with the Court, with the procedure, with federal law, and with the [F]ederal [R]ules of [E]vidence. I strongly urge you to not continue to ask me to represent yourself. Even though this is only the second time you have voiced it. I think it's a big mistake.

Defendant: Well, I mean, it's impossible at this point, Your Honor. I mean we're here at the closing of trial, and it would be impossible for me to represent myself at this point anyway. I don't understand this kind of question.

The Court: Well, it would have been the very same situation had we

done so yesterday.

Defendant: That's a day that makes a difference.

The Court: We did not start the trial – we did not start the trial till today. So what would be different[?]

Defendant: The trial had started. That's the difference. The opening started, you know, the direct[,] the prosecutor has already put on his case, cross examination started, so, you know that any concerns about me representin' [sic] myself in this matter is definitely beyond my understandin' [sic] because the trial is almost over. I mean, the trial is over. I'm quite sure we're not gonna [sic] start [anew].[29]

The Court: You know, my problem with what you've been doing, Mr. Vas, is that I don't believe you ever really meant it.

Defendant: Well, I respect your opinion, ma'am.

The Court: [I don't believe that you truly meant it, Mr. Vas.] Because you certainly are not prepared —[30]

Defendant: Well[,] if you you'd a [sic] give me a chance yesterday, I'd a showed [sic] you.

The Court: You certainly are not prepared to represent yourself.

Defendant: Believe me when I tell you that I am. Believe me when I tell you I coulda [sic] done a much better job.

The Court: Well, could have is a past term.

Defendant: So is me representin' [sic] myself, and —

The Court: And you're no longer asking to represent yourself?

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[29] The trial transcript misrepresents the actual exchange between Defendant and the Court. The language contained herein, however, accurately recounts the exchange. See 10/26/2005 N.T. at 141.

[30] The trial transcript also misrepresents this exchange between Defendant and the Court. The language contained herein, however, accurately recounts the exchange. See 10/26/2005 N.T. at 142.

Defendant: This is a type of tricks [sic]?

The Court: Well, you may be suspicious, but I'm trying to conduct a colloquy here. Did you answer me?

Defendant: What was the question?

The Court: Are you any longer asking to represent yourself?

Defendant: Yes, I would like to start a new trial now, and I would like to represent myself from the beginning of the trial, and represent myself in the entirety of the trial, not a fragment, or a portion of a trial, like this that's already been spoiled by ineffective counsel that I complained about for the longest.

The Court: I hear what you're saying.

Defendant: Yes, ma'am.

The Court: But that requires the same situation or similar situation as yesterday, when you – you were not clearly prepared to go to trial because—

Defendant: What did you base that on?

The Court: —you had an oral last minute motion, and I wasn't going to delay the trial.

* * *

The Court: Are you any longer, in this trial, at this point, asking to represent yourself?

Defendant: Again, I —

The Court: Just answer my question, yes or no, please.

Defendant: I would like to start – I would want to represent myself at trial. I don't want to represent myself in a portion of a trial that's already been spoiled by ineffective assistance of counsel.

The Court: Well, just as I would not allow you to delay the trial yesterday, I won't allow you to get a new trial today.

Defendant: Yes, ma'am.

The Court: So, what is the answer to my question. And this is the last time I am going to ask you.

Defendant: [W]ell, Your Honor, I would like to represent myself —

The Court: You would?

Defendant: — at trial in the beginning of a trial, not represent myself behind another person.

The Court: Do I take it to mean that you don't wish to represent yourself right now in this proceeding? With Mr. Egan as backup counsel. . . .

Defendant: I don't – I'm not confident of representin' [sic] myself after the trial has been spoiled by ineffective assistance of counsel.

The Court: But the real question is —

Defendant: That's the real answer.

The Court: If I understand you correctly, at this point in the trial, you do not choose to represent yourself. Is that correct?

Defendant: At this point in the trial, I feel it is impossible for me to—

The Court: Just deal with the reality of the question, sir.

Defendant: At this point in the trial, I feel as though, it's impossible to represent myself at this junction [sic] and have a fair and impartial trial that has already been soiled [sic] at this point.

The Court: Well, I take it that Mr. Vas does not want to represent

himself now, Mr. Egan, so the ball is still in your court.[31]

II. Discussion

Defendant contends that "the interests of justice require a new trial because the Court failed adequately [to] address the defendant's request to represent himself at trial."[32] The Sixth Amendment right to self-representation can only be exercised by first waiving a concurrent right "that is also guaranteed under the Sixth Amendment; the right to counsel."[33] The line of cases establishing the principle that a criminal defendant's waiver of a constitutional right must be voluntary, knowing, and intelligent is long and unbroken.[34] Thus, "the constitutional right of self-representation in a criminal case is conditioned upon a voluntary, knowing, and intelligent waiver of the right to be represented by counsel."[35] In the context of a criminal defendant's waiver of his Sixth Amendment right to counsel, the Third Circuit teaches that waiver of the right "depends in each case 'upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.'"[36]

Additionally, the Third Circuit instructs trial courts to "indulge every reasonable

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[31] 10/26/2005 N.T. at 123 - 147.

[32] Def. Mot. for New Trial at 1 [Doc. #109].

[33] Buhl v. Cooksey, 233 F.3d 783, 789 (3d Cir. 2000).

[34] See Edwards v. Arizona, 451 U.S. 477, 482 (1981); Von Moltke v. Gillies, 332 U.S. 708 (1948); Johnson v. Zerbst, 304 U.S. 458 (1938).

[35] Buhl, 233 F.3d at 789.

[36] Id. at 790 (quoting Edwards, 451 U.S. at 482).

presumption against a waiver of counsel."[37] For a criminal defendant to overcome this forceful presumption, he "must clearly and unequivocally ask to proceed *pro se*."[38] However, a criminal defendant "need not 'recite some talismanic formula . . .' to invoke his/her Sixth Amendment right[] to self-representation."[39] Rather, a defendant "must do no more than state his request, either orally or in writing, unambiguously to the court so that no reasonable person can say that the request was not made."[40]

Once a criminal defendant makes a clear and unequivocal request to waive his right to counsel and proceed *pro se*, the trial court "must inquire thoroughly to satisfy itself that the defendant understands 'the nature of the charges, the range of possible punishments, potential defenses, technical problems that the defendant may encounter, and any other facts important to a general understanding of the risks involved.'"[41] Faretta and its progeny establish as the touchstone of a criminal defendant's Sixth Amendment right of self-representation the requirement that a trial court inquire to determine whether or not the defendant's purported waiver of his constitutional right is made knowingly, voluntarily, and intelligently.[42]

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[37] Id. (citing Stano v. Dugger, 921 F.2d 1125, 1143 (11th Cir. 1991) (en banc) (explaining that, although the right to counsel "attaches automatically and must be waived affirmatively to be lost," the right to self-representation does not "attach unless and until it is asserted.").

[38] Id.

[39] Id. at 792.

[40] Id. (quoting Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986)).

[41] United States v. Peppers, 302 F.3d 120, 132 (3d Cir. 2002) (quoting Virgin Islands v. Charles, 72 F.3d 401, 404 (3d Cir. 1995)).

[42] See e.g., Buhl, 233 F.3d 783 (holding that a criminal defendant's "Sixth Amendment rights were not adequately protected" where the trial court failed to conduct an inquiry into the defendant's purported waiver of counsel); Peppers, 674 F.2d 185 (holding that because the district court did not inquire upon defendant's request to represent himself whether he understood the implications of proceeding pros se defendant had not effectively waived

Unfortunately, however, it is sometimes the case that criminal defendants seize upon the right to self-representation as a tool for manipulation and disruption of the court's proceedings and calendar. The Third Circuit is not indifferent to this concern; rather, it "undertand[s] and perhaps even empathize[s] . . . with the frustration and exasperation of the district court judge" who encounters a defendant whose purported invocation of the right to self-representation gives rise to "well-founded suspicions of intentional delay and manipulative tactics."[43] Nonetheless, suspicion of illegitimate intentions does "not negate the court's duty to inquire under Faretta."[44] Instead, a court is required to inquire "even when the trial judge suspects that the defendant is 'attempting to disrupt the administration of justice by manipulative requests for . . . dismissal of . . . counsel.'"[45]

Defendant's Motion for New Trial presents two narrow issues: (1) whether a trial court, confronted with a criminal defendant's seemingly whimsical and reactionary initial request to represent himself moments before jury selection is to begin, must conduct a Faretta inquiry where the defendant has filed numerous *pro se* motions requesting substitute counsel rather than the opportunity to represent himself and (2) whether a trial court that initially denies a criminal defendant's pre-trial request to represent himself without first conducting a Faretta inquiry nevertheless respects a defendant's Sixth Amendment right to self-representation by conducting the inquiry after the trial has commenced with the defendant represented by counsel.

Although Defendant flatly contends that the Court should grant him a new trial

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his Sixth Amendment right to counsel).

[43] United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982).

[44] Buhl, 233 F.3d at 796.

[45] Id. (citing Welty, 674 F.2d at 193).

because the "Court erred by . . . denying [him] his right to represent himself at trial,"[46] the issue is not that simple. This Court is directed to assess Defendant's purported waiver of his Sixth Amendment right in favor of self-representation in light of the facts and circumstances surrounding his case, which include his background, experience, and conduct.[47] Here, Defendant filed several *pro se* motions with the Court before his trial began, three of which mentioned his concern with his attorney's representation in this matter.[48] Additionally, Defendant addressed the Court at two hearings—one of which was conducted specifically to hear his argument for substitute counsel. However, at no point in time, either when filing papers with the Court or arguing *pro se* motions before it, did Defendant ever broach the topic of representing himself.

Rather, frustrated by the Court's resolution to a discovery issue, Defendant made an agitated, ill-hatched, and impromptu request, through his lawyer, to represent himself moments before his jury was to be impaneled. Although it strains credulity to take such a request seriously, the law requires Defendant to do no more than make a clear and unequivocal request to represent himself in order to activate the trial court's duty to conduct the Faretta inquiry. Here, scrutiny of Defendant's assertion that he wanted to proceed *pro se* reveals, irrespective of the circumstances surrounding the assertion, that a reasonable person cannot say that the request to proceed *pro se* was not made.[49]

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[46] Def. Mot. for New Trial at 4 [Doc. #109].

[47] See Buhl, 233 F.3d at 790.

[48] See Doc. ## 61, 64, and 66. Again, the Court notes that Defendant's contention that his attorney was not performing competently and diligently on his behalf in this matter lacks merit.

[49] See Buhl, 233 F.3d at 790.

Nonetheless, the government argues that Defendant's initial request to proceed *pro se* did not warrant a Faretta inquiry because it was not made clearly and unequivocally. To support its contention, the government points to the following circumstances: (1) none of Defendant's pretrial motions included "any request to be permitted to represent himself"; (2) Defendant's lawyer argued motions on his behalf on the morning of trial; and (3) Defendant failed to request to proceed *pro se* when the Court asked him whether he was satisfied with his attorney's advice concerning the decision to wear prison garb. [50] Additionally, the government argues that, due to the timing and context of Defendant's request, the Court was "entitled to view this offhand comment to counsel as nothing more than a . . . last minute gambit to disrupt the trial, rather than a clear and unequivocal request to proceed *pro se*."[51]

The government is correct insofar as it contends that the circumstances leading up to and surrounding Defendant's request to proceed *pro se* validly raised the Court's concern that his request to represent himself was not an authentic assertion of a constitutional right, but a strategem to undermine the proceedings. However, the government's argument ultimately fails, because even "well-founded suspicions of . . . manipulative tactics"[52] do not overcome the Court's duty to conduct the Faretta inquiry.[53]

Finally, the question of whether the Faretta inquiry that the Court ultimately

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[50] Gov.'s Resp. to Mot. for New Trial at 8.

[51] Id.

[52] United States v. Welty, 674 F.2d 185, 189 (3d Cir. 1982).

[53] Buhl, 233 F.3d at 796 (noting that while "[a] court may conclude that a defendant who intends nothing more than disruption and delay is not actually tendering a knowing, voluntary, and intelligent waiver of counsel . . .[,] the court cannot properly make such a determination without first conducting an adequate inquiry under Faretta.").

administered upheld Defendant's right to self-representation must be answered by looking to the nature of the right itself. Where a criminal defendant purports to waive his Sixth Amendment right to counsel, that right is protected only by a court conducting a "sufficiently penetrating inquiry"[54] to ensure that the purported waiver was made knowingly, voluntarily, and intelligently. And as the lone safeguard in this context of a constitutional right, it follows that the inquiry protecting the right must precede a ruling affecting it. Therefore, the Court concludes that the inquiry it subsequently conducted in this case did not cure its initial omission.

III. Conclusion

In sum, although Defendant's antics cloud the issue of whether or not his request to represent himself was legitimately made and despite the fact that the Court ultimately conducted a thorough inquiry to determine whether Defendant's request to proceed *pro se* was made in full recognition of the charges against him, possible punishments and defenses, and the logistical pitfalls inherent in self-representation, the Court concludes, in an abundance of caution, that it erred in its failure to conduct a Faretta inquiry when Defendant made his initial request to represent himself. As such, Defendant will be granted a new trial.

An appropriate ORDER follows.

[54] United States v. Peppers, 302 F.3d 120, 131 (3d Cir. 2001).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL No. 04-489**
	:	
v.	**:**	
	:	
NORVEL VAS	**:**	

ORDER

AND NOW, this 30th day of May 2006, upon consideration of Defendant's Motion for New Trial [Doc. #109] and the Government's Response thereto [Doc. #93],[55] it is hereby Ordered that Defendant's Motion for New Trial is GRANTED. Trial is scheduled for August 8, 2006 at 9:30 a.m. before the Honorable Cynthia M. Rufe. Defendant's outstanding motions for new trial [Doc. ## 88, 108] and addenda to the Motions for New Trial [Doc. ##92, 94] are hereby DISMISSED AS MOOT.

It is so ORDERED.

BY THE COURT:

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Cynthia M. Rufe, J.

[55] Defendant's trial counsel, Patrick Egan, Esquire, filed Defendant's initial Motion for New Trial Pursuant to Rule 33 [Doc. 88] on November 7, 2005. The Government responded to Defendant's initial Motion for New Trial on November 23, 2005[Doc. #93]. On December 28, 2005, Mr. Egan filed a Motion to Withdraw as Attorney [Doc. #96], which the Court granted on January 9, 2006 [Doc. #100]. On January 10, the Court appointed Edward C. Meehan, Jr., Esquire (from the Criminal Justice Act panel) and granted him leave to file amended post-trial motions [Doc #101]. On April 20, 2006, Mr. Meehan filed the Motion for New Trial presently before the Court. The Government has informed the Court that, in response to the present motion, it stands on the strength of its argument made in opposition to Defendant's initial Motion for New Trial.